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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. ~~689~~ 34

TIMES FILM CORPORATION,

Petitioner,

vs.

CITY OF CHICAGO, RICHARD J. DALEY AND TIMOTHY J. O'CONNOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinions below are adequately set forth in the Appendixes A and B of the Petition. The opinion of the United States Court of Appeals for the Seventh Circuit is now reported as *Times Film Corporation* v. *City of Chicago* (1959), 272 F. 2d 90.

QUESTIONS PRESENTED.

Petitioner has failed to fully apprise this Court of the following issues:

1. Does the Court have jurisdiction?
2. Is there a justiciable controversy?

3. Is there a "substantial" federal question?
4. Has petitioner suffered a direct or threatened injury?
5. May one who has failed to make proper application for a permit to exhibit a motion picture attack the validity of the ordinance requiring such application because of his anticipation of improper or invalid action?
6. Is prior restraint of motion pictures, *per se*, a violation of the 1st and 14th Amendments?
7. Is the inquiry here involved too remote and abstract for the proper exercise of the judicial function?
8. May a "scatter-shot" attack upon the constitutionality of an ordinance, without specific allegations, be sustained?
9. Has petitioner proven that it will suffer an immediate and irreparable harm so as to justify the intervention of a court of equity?

The foregoing were the issues before the District Court (Petition, pp. 2a-4a) and the United States Court of Appeals (*Times Film Corporation* v. *City of Chicago*, 272 F. 2d 90). Therefore, they must also be the issues before this Court.

ARGUMENT.

I.

The decision of the court below does not involve an important question of federal law which should be settled by this Court.

Petitioner contends as a basis for granting the writ that the court below has decided an important question of federal law not heretofore ruled upon by this Court (Petition, pp. 4-6). Such a contention is without foundation.

It is significant that petitioner fails to point out the factors which motivated the trial court and the court below in their decisions. However, a mere reading of the opinions below (Petition, pp. 1a-4a; *Times Film Corporation v. City of Chicago*, 272 F. 2d 90) conclusively demonstrates that petitioner's contentions in this Court bear no relationship to the issues which arose below and which formed the basis of the decisions below.

The decision below involves the application of familiar principles of constitutional law and it fully conforms with this Court's prior decisions. No novel issue of law is present. As the court below found (*Times Film Corporation v. City of Chicago*, 272 F. 2d 90, 91), petitioner has reduced the facts to an abstract question in the hope that this Court will accept them and rule on the validity of a municipal ordinance without any knowledge as to the subject matter of the motion picture to which the ordinance is applicable.

The great constitutional safeguards pertaining to freedom of speech and of the press under the First and Fourteenth Amendments are not involved in this proceeding.

Petitioner refers to them and relies upon them. But petitioner can have no standing in this Court when it refuses to relate or exhibit the nature of the film in question.

Petitioner's first reason for granting the writ is that the court below has "decided an important question of federal law which has not been but should be, decided by this Court" (Petition, p. 4). This is, of course, only a verbatim iteration of Rule 19 (1) (b) of this Court. However, petitioner wholly fails to tell this Court what the purported "important question of federal law" might be, as related to the facts in this case. On the other hand, the District Court found there was no "substantial" federal question (Petition, Appendix A, page 2a). While the Circuit Court held that the case "has been reduced * * * to an abstract question of law" (*Times Film Corporation* v. *City of Chicago*, 272 F. 2d 90, 91).

Although petitioner does not so state, we can only assume that petitioner is fearful that exhibition of its film may be denied because of obscenity. At least, all of the authorities upon which petitioner relies are concerned with this subject. Appendix C attached to the Petition (pp. 13a, 14a) lists cases, not one of which overthrows the validity of the ordinance under consideration. In fact, *American Civil Liberties Union* v. *City of Chicago* (1955), 3 Ill. 2d 334, 121 N. E. 2d 585, specifically and unequivocally sustained the constitutionality of the ordinance as did *Times Film Corporation* v. *City of Chicago* (1957), 244 F. 2d 432 (C. A. 7); 355 U. S. 35. The fact that subsequently the motion pictures there involved were permitted to be shown does not affect the constitutionality of the ordinance. Because it was decided that such motion pictures were not, in point of fact, obscene, and therefore allowable, does not change in any way the positive position of the various courts on the issue of the constitutionality of the ordinance. This Court, also, has gone on record as approving rejection

of motion pictures on the ground of obscenity. *Roth* v. *United States* (*Alberts* v. *California*) (1957), 354 U. S. 476. We are nonplussed by petitioner's failure to cite this case. It was relied upon (and cited) by both parties in the court below. It would be decisive of the issues here if obscenity or constitutionality were involved.

But, the only issue before this Court, as proven by the memorandum order of the trial court (Petition, Appendix A, p. 2a) and the opinion of the Court of Appeals (*Times Film Corporation* v. *City of Chicago*, 272 F. 2d 90), is whether or not there is a justiciable controversy. This was effectivelly answered by this Court in *Smith* v. *Cahoon* (1931), 283 U. S. 553. The relevance of the *Smith* case and the issue of justiciable controversy were argued by both parties in their briefs filed in the court below. Strangely, petitioner has now shied away from this issue.

II.

The court below did not decide a federal question in a manner conflicting with the applicable decisions of this Court.

Petitioner contends (Petition, p. 6) that the court below has decided a federal question in a manner conflicting with the applicable decisions of this Court. Again, petitioner merely iterates the provisions of Rule 19(1)(b) in stating this conclusion.

It is significant that petitioner first argues that the court below decided a question which *has not been*, but should be, decided by this Court (Petition, p. 4), and that petitioner now argues that the court below decided a question in conflict with the applicable decisions of this Court (Petition,

p. 6). This seems to us to be paradoxical. Both statements cannot be true. One must fall if the other is correct. Apparently, petitioner disregarded their contradictory aspects.

Petitioner states (Petition, p. 7) that the decision of the court below is in conflict with this Court's decision in *Burstyn* v. *Wilson* (1952), 343 U. S. 495. Having stated this conclusion, petitioner leaves the assessment of its merits to respondents and to this Court. Petitioner, itself, does not demonstrate the alleged "conflict." The fact is that the issues in this case are entirely different from those in the *Burstyn* case. The memorandum order of the trial court and the opinion of the court below show clearly the issues. The *Burstyn* case stands for the proposition that the word "sacrilegious" is vague and indefinite. It also holds that the constitutional safeguards implicit in the First and Fourteenth Amendments are applicable to motion pictures. We do not gainsay these things, but their relevance is questioned.

In the *Burstyn* case this Court held it was not necessary for the Court to decide "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films" (p. 506). And in *Roth* v. *United States* (*Alberts* v. *California*) (1957), 354 U. S. 476, this Court stated (p. 481):

> "The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First * * * or * * * Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."

and again (pp. 484, 485):

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. * * *
>
> "*'We hold that obscenity is not within the area of constitutionally protected speech or press.'* (Emphasis supplied.)

Thus, it is apparent that there is no merit to petitioner's contentions, even if obscenity were involved. The decision of the court below is not in conflict with the *Burstyn* case, nor with any other decision of this Court.

Petitioner is employing the same vague generalizations that it employed in the courts below. The end result is the same. No one knows what petitioner asks this Court to approve. Petitioner seeks from respondents, and from this Court, carte blanche or a blank check vesting in petitioner the unparalleled right to exhibit a motion picture depicting something unknown to any of us.

Conclusion.

We have demonstrated that there is no justiciable controversy because petitioner failed to make the required application for a license and that petitioner is anticipating improper action without any foundation in fact.

We have further shown that no novel question of federal law is present nor was any decided by the court below.

We have also proven that the decision of the court below is not in conflict with the prior decisions of this Court.

Finally, we have shown that petitioner has deliberately set about to create a narrowed down, abstract set of facts in a futile effort to persuade this Court to pass on constitutional questions which were not in issue or were not decided by the court below.

Wherefore, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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